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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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No. 593

DIRECT SALES COMPANY, INC.,

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vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Direct Sales Company, Inc., a New York corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled cause on November 13, 1942, affirming a judgment of conviction of the appellant in the District Court of the United States for the Western District of South Carolina.

Opinions Below.

1. An opinion written by the Hon. C. C. Wyche, District Judge (R. 21), is reported in 40 F. Supp. 917.

2. An opinion written by the Hon. C. C. Wyche, District Judge, on petitioner's motion after verdict (R. 242), is reported in 44 F. Supp. 623.

3. The opinion of the Circuit Court of Appeals (R. 266), is not yet reported.

Jurisdiction.

The judgment, affirming the conviction of the petitioner, by the Circuit Court of Appeals for the Fourth Circuit, was entered November 13, 1942 (R. 269). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether there was sufficient evidence to sustain petitioner's conviction of conspiracy to violate the Harrison Narcotic Act.

2. Whether sales of morphine sulphate tablets by petitioner, a New York manufacturer and wholesaler of drugs, to a South Carolina physician, both licensed by Government, pursuant to Act, in substantial amounts at frequent intervals, is sufficient to show "knowledge" of a conspiracy on the part of petitioner.

3. Whether petitioner was not entitled to a directed verdict of not guilty, because there was no evidence to show that it performed any act with knowledge of any conspiracy between Dr. Tate and others.

4. Whether petitioner was not entitled to a directed verdict of not guilty because its manner of sales, both as to quantity and frequency, were pursuant to written instructions of Commissioner of Narcotics and his agents.

Statute Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides

If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both.

Statement.

In May, 1940 (R. 1), the petitioner, a New York corporation, together with Dr. John V. Tate, a practicing physician in Calhoun Falls, S. C., and three others, were indicted in the District Court for the Western District of South Carolina. The indictment, in a single count, charged a conspiracy to defraud the United States of its revenues by obtaining large quantities of morphine sulphate by use of official order forms for purposes other than in the conduct of a lawful business in said drugs or in the legitimate practice of medicine. Fifty-three overt acts were alleged (R. 3).

Two of the defendants, George C. Johnson and Reel Black, pled guilty before trial (R. 33); the defendant Clyde A. Foster proceeded to trial but a severance was granted to him during the progress of the trial because of his illness (R. 145).

The petitioner, at the close of the Government's case, moved for a directed verdict of not guilty, on the ground that the evidence was insufficient to establish conspiracy against it. Decision was reversed on such motion (R. 183-184). This motion was renewed at the conclusion of the entire case; said motion was denied and exception taken (R. 223-224). The petitioner and Dr. Tate were convicted

and the former was directed to pay a fine of $1,000. On appeal by petitioner, the Circuit Court of Appeals for the Fourth Circuit affirmed the conviction.

The petitioner, a New York corporation, having its only place of business in the City of Buffalo, New York, is a manufacturer and wholesaler of drugs, and was duly registered as such under the provision of the Harrison Narcotic Act during the time mentioned in the indictment. Dr. Tate was a physician residing at Calhoun Falls, S. C., and was duly registered as such under the Harrison Narcotic Act. The petitioner is a direct mail order concern, having no traveling representatives whatsoever. It published catalogs containing numerous pharmaceutical products as well as narcotic preparations, and listed the price of narcotics in lots of one hundred to five thousand one-quarter grain and one-half grain tablets. In the latter part of 1940, pursuant to correspondence from the Office of the Commissioner of Narcotics, the petitioner changed the form of his catalog and took the narcotic items from the general listing and listed them on a separate sheet (R. 92, 200-201).

It should be noted that both the Trial Judge, in his opinion in denying a motion for a new trial, as well as the Circuit Court, based their opinions on an erroneous interpretation of the evidence. The Trial Judge, in his opinion, stated that narcotics were not listed in the catalog itself, and that petitioner's uniform practice, during the period alleged in the indictment, was to insert a colored sheet of paper, on which was listed morphine sulphate (R. 243). The Circuit Court, in its opinion, copied the exact phraseology of the Trial Court's opinion (R. 267-268), and as a result both were in error, inasmuch as the evidence shows that petitioner did not separate the narcotic list from the general listings in the catalog until late 1940 (R. 201), which was subsequent to the period alleged in the indictment.

Under the Statute, Dr. Tate could not order narcotics without obtaining official order forms from the Collector of Internal Revenue in his district (R. 85); nor could petitioner sell or deliver narcotics without the receipt of an official order form properly endorsed and properly executed (R. 184-185); also, petitioner files a report every thirty days in the office of the Collector of Internal Revenue at Buffalo, New York, showing names of persons to whom narcotics were sold and the amount, and which included Dr. Tate's name (R. 186-187).

The Government did show frequent and numerous sales by petitioner to Dr. Tate, pursuant to official order forms, between 1937 and 1940. The evidence shows that Narcotic Agent Bransky inspected the methods of petitioner at its office, in August and September, 1936; that there was presented to such agent, for inspection, the official order forms received by petitioner from Dr. Tate from January 1, 1936 to June 19, 1936, which amounted to nine in number and ordered in the aggregate 6700 one-half grains of morphine sulphate (R. 135, 136), petitioner's exhibit 4; also, during August and September, 1936, while Agent Bransky was at petitioner's plant, he requested that all orders for narcotics be placed on his desk so that he could see the quantities being purchased by registrants (R. 136-137), that during such period, two orders were received from Dr. Tate for 600 and 800 half grains of morphine sulphate (R. 137), petitioner's Exhibit 5; that as a result of such inspection, Agent Bransky prepared and delivered to petitioner a table setting forth the quantity that petitioner could fill on any one order to physicians, hospitals, sanitariums and others (R. 151, 152, petitioner's exhibit 14); and on October 20, 1936, after the departure of Agent Bransky from petitioner's office, Commissioner of Narcotics Anslinger sent petitioner a letter, informing it that it could fill physicians official order

forms up to 1,000 half grain tablets, but on all orders in excess of such amount to withhold fulfillment and communicate with the Commissioner for instructions (R. 159, petitioner's exhibit 20); the Government's case admitted that Agent Bransky asked petitioner's officer to limit the sale of tablets of morphine sulphate to 1,000 half-grain tablets to each order form, to which suggestion petitioner assented (R. 126).

Dr. Tate, sworn as a witness for the Government, admitted that he had never seen the petitioner's president prior to the date of trial, November 10, 1941 (R. 106); that he never conversed with any of its officers and that his only contact with petitioner was through the medium of the official order form (R. 108).

It is therefore apparent that during the indictment period the petitioner was selling to 14,400 doctors, whose names were contained on their mailing list, throughout the United States (R. 139).

It thus appears that the Government, in its prosecution, as well as the Trial Court and the Circuit Court in its opinions and decisions, proceeded on an erroneous interpretation of the evidence as to the slip containing narcotics being separate and apart from the catalog itself. Stripped of this error, the evidence presented a situation where a licensed manufacturer and wholesaler had sold to a licensed physician, only on official order forms, a quantity of morphine sulphate tablets at frequent intervals. This surely was a total failure on the part of the Government to prove the essential elements of conspiracy. Not one word of testimony was elicited to show that petitioner had any connection with the illegal sales by Dr. Tate to other alleged co-conspirators. In fact, the proof, by petitioner's officer, was to the effect that the size of the sales could be justified by a doctor's use of the same hypodermically, orally or as medicating tablets (R. 216), and said officer further testified

that in making a gallon of cough syrup, a doctor would use 96 quarter grain tablets (R. 218).

The District Court was doubtful of the sufficiency of the evidence to entitle submission of the case to the jury and stated, in denying petitioner's motion for a directed verdict, that if a novel question was not involved, it might be inclined to grant petitioner's motion. Further, that it thought that there was a question involved that ought to be settled by the Circuit Court (R. 224).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In sustaining the action of the District Court in denying defendant's motion for a directed verdict of not guilty, both at the close of the Government's case and again at the close of the entire case.

2. In refusing to rule that the District Court should have granted petitioner's motion to set aside verdict and for a new trial.

3. In holding that the decision of *United States* v. *Falcone*, 311 U. S. 205, is inapplicable to the case at bar.

4. In holding that the evidence was sufficient to support the verdict of the jury.

5. In holding that petitioner violated its agreement with Narcotic Commissioner, when upon receipt of an order from Dr. Tate for more than the agreed quantity, it shipped the maximum specified and asked Dr. Tate to make out a new form for the excess. A reading of Government's exhibit 4 will confirm this error.

6. The Court erred in its charge to the jury that they had to convict both defendants, they could not convict one.

Reasons for Granting the Writ.

I.

The decision of the Court below appears to be in direct conflict with the decision of the Eighth Circuit holding that the act does not place upon a druggist the burden of inquiry into the intent and purpose of the physician in issuing the prescription, to the contrary it expressly authorizes the druggist to sell on prescriptions issued by registered physicians. *Echert* v. *United States*, 7 F. (2d) 257.

The Circuit Court of Appeals in its opinion (R. 269), expressly stated that the facts of the instant case are distinguishable from *United States* v. *Falcone*, 311 U. S. 205, but failed to point out the evidence constituting the so-called distinguishing features.

It would appear that the decision of the Court below is in conflict with the decisions holding that those having no knowledge of the conspiracy are not conspirators, *United States* v. *Hirsch*, 100 U. S. 33; *Weniger* v. *United States*, 47 F. (2d) 692; and that one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

These decisions by analogy seem directly applicable to petitioner as a manufacturer and wholesale supplier.

II

This case involves a question of tremendous importance in the administration of the provisions of the Harrison Narcotic Act, and should be finally determined by this Court. This is a test case instituted by the Government to obtain a construction of the Harrison Narcotic Act, as applied to manufacturers and is the first case of its kind to be brought

to the attention of this Court. If the decision of the lower Court is allowed to stand, the petitioner would feel constrained to carry on business in the territory embraced by the Fourth Circuit, whereas in the Second, Fifth and Eighth Circuits there would be no reason for curtailment of such business. Further, as a result of the Court's interpretation, the Commissioner of Narcotics has caused manufacturers to refuse to sell opium and its derivatives to petitioner, which threatens to terminate petitioner's business.

III

The Circuit Court of Appeals, in affirming judgment of conviction, held in effect that there was evidence which warranted the submission of the case to the jury. However, the Court below not only failed to point out evidence which would sustain such conclusion, but adopted the error of the Trial Court, relative to the narcotic slips in the catalog, in attempting to justify its affirmance. The petitioner contends that the record contains no such evidence.

Conclusion.

For the reasons stated, the writ should issue as herein prayed.

December 1942.

DIRECT SALES COMPANY, INC.,
By GEORGE J. DOTTERWEICH,
President.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

George J. Dotterweich, being duly sworn, deposes and says that he is the president for the petitioner in the above-entitled matter; that the foregoing petition is true

to his own knowledge except as to the matters as therein stated to be alleged on information or belief and that as to those matters, he believes it to be true.

GEORGE J. DOTTERWEICH.

Sworn to before me this 7th day of December, 1942.

WILLIAM B. MAHONEY,
Notary Public, Erie County.

EDWIN J. CULLIGAN,
Counsel for Petitioner,
Liberty Bank Building,
Buffalo, New York.

Of Counsel:

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Buffalo, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit has not been officially reported. The opinion of the Circuit Court was rendered November 12, 1942 (R. 266).

Jurisdiction.

The judgment of the Circuit Court of Appeals affirming the conviction of petitioner was entered November 13, 1942 (R. 269). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether there was sufficient evidence to sustain petitioner's conviction of conspiracy to violate the Harrison Narcotic Act.

2. Whether sales of morphine sulphate tablets by petitioner, a New York manufacturer and wholesaler of drugs, to a South Carolina physician, both licensed by Government, pursuant to Act, in substantial amounts at frequent intervals, is sufficient to show "knowledge" of a conspiracy on the part of petitioner.

3. Whether petitioner was not entitled to a directed verdict of not guilty, because there was no evidence to show that it performed any act with knowledge of any conspiracy between Dr. Tate and others.

4. Whether petitioner was not entitled to a directed verdict of not guilty because its manner of sales, both as to quantity and frequency, were pursuant to written instructions of Commissioner of Narcotics and his agents.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides

> "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both."

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids,

abets, counsels, commands, induces, or procures its commission, is a principal."

Article III of Joint Narcotic Regulations made by Commissioner of Internal Revenue with approval of Secretary of Treasury, effective January 1, 1928, provides

> "Correspondence: Correspondence relative to interpretation of the law and these regulations may be addressed to the Commissioner of Prohibition, Washington, D. C. Inquiries relative to registration and requests for blank forms should be addressed to the various collectors of internal revenue. * * *."

Statement.

In May 1940, the petitioner, Dr. John V. Tate, and three others were indicted in the Western District of South Carolina (R. 1). The indictment charged, in a single count, a conspiracy to defraud the United States of its revenues by violating the provisions of the Harrison Narcotic Act. The substance of the indictment was that the petitioner and Dr. John V. Tate, through the use of official order forms, would secure large quantities of morphine sulphate for purposes other than in the conduct of a lawful business in said drugs or in the legitimate practice of medicine, during a period from 1933 to June 1940 (R. 2). Two of the defendants pleaded guilty and a severance was granted as to a third defendant (R. 145). Dr. John V. Tate pleaded not guilty but appeared as a witness on behalf of the Government (R. 84). The case was submitted to the jury as to petitioner and Dr. John V. Tate, and both were convicted (R. 239); the petitioner was sentenced to pay a fine of $1,000.00 and no disposition was made as to Dr. Tate's matter (R. 253).

On appeal by the petitioner only, the Circuit Court of Appeals for the Fourth Circuit affirmed the conviction (R. 269); the Circuit Court held that the evidence was

sufficient to support the verdict of the jury and that it, petitioner, must have known, because of the quantity sold, that Dr. Tate was disposing of the morphine sulphate in violation of the law.

The petitioner's guilt was based upon the following evidence:

Petitioner is a New York corporation, engaged in the mail order business of a manufacturer and wholesale dealer in narcotics and registered under the provisions of the Harrison Narcotic Act (R. 1). Dr. John V. Tate is a physician practicing in Calhoun Falls, South Carolina and duly registered under the provisions of the Harrison Narcotic Act (R. 1). The other three defendants were residents of Georgia and South Carolina and were not registered under the provisions of said Act (R. 2).

The petitioner sells directly to the customer, the majority of whom are on a mailing list of physicians throughout the United States, in the number of 14,400 (R. 139); it has no traveling representatives but solicited business by means of catalogs and circulars (R. 92). The catalogs were of pamphlet size, containing a list of pharmaceutical supplies and narcotics with the order number and price per article or lot sale of same.

During the time of the indictment, the catalog did not contain a separate sheet of paper, in pink or blue color, listing narcotics (R. 92), as set forth in opinion of Trial Judge (R. 243) and opinion of Circuit Court (R. 267-268).

Dr. Tate, a physician at Calhoun Falls, South Carolina, who was registered with the Collector of Internal Revenue under the Harrison Narcotic Act (R. 1), purchased by means of official order forms various amounts of morphine sulphate from petitioner. These forms were required to be executed by physician in duplicate, the original forwarded to wholesaler and the duplicate kept by physician for a period of two years (R. 85-86, Govt. Ex. 2). Dr.

Tate's last purchase from petitioner was May 24, 1940 (R. 99, defendant's exhibit 1).

Various purchass of morphine sulphate were made by Agent Rogers, informer LaMarr and the defendant George C. Johnson from Dr. Tate (R. 42, 49, 59). Dr. Tate never conversed with anyone connected with petitioner and it had no information as to sales being made by Dr. Tate (R. 108-109).

In August-September, 1936, narcotic agent Bransky conducted an inspection of petitioner's manufacturing establishment at the direction of the Commissioner of Narcotics (R. 119). He furnished petitioner with a list of names of doctors who had been convicted as violators of the Narcotic Law (R. 121, Govt. Ex. 6). He requested that the lists in the catalogs be reduced from 5,000 to 1,000 and petitioner complied with this request and reprinted its catalog (R. 124, 130). Agent Bransky examined all narcotic orders received by petitioner between January 1, 1936 and June 30, 1936 (R. 132), and these included nine official order forms aggregating 6,700 half grain morphine tablets (R. 135-136, Defendant's exhibit 4). He also directed petitioner's employees to submit all order forms for narcotics to him; among these were two from Dr. Tate within seventeen days for 1,400 half grain morphine sulphate tablets; he made no objection to these orders (R. 137-138, Defendant's exhibit 5). After delivery of letter of August 12, 1936 to petitioner (Govt's Ex. 6), Bransky repeatedly removed the names of doctors from such alleged list as well as from other black lists delivered to petitioner (R. 141, Defendant's Exs. 6, 7, 8, 9, 11, 12, 13); this removal was pursuant to instructions from Commissioner of Narcotics (R. 143).

Bransky, in 1936, while at the office of petitioner, prepared an approved schedule setting forth the quantities of morphine sulphate tablets which could be dispensed to doctors, druggists and hospitals on any one order (R. 151-

152, Defendant's exhibit 14). This schedule set the number to be sold to a doctor on any one order at 1,000 tablets and in reply to Court's inquiry "That was 1,000 tablets for what period?", he answered, "There wasn't any period set" (R. 152).

Commissioner of Narcotics Anslinger sent a letter to petitioner dated October 20, 1936, wherein he stated "It is also suggested that no physician or other practitioner be supplied in excess of 1,000 one-half grain tablets or their equivalent in tablets of other size, or one ounce of cube morphine on any one order * * *" (R. 159, Defendant's Ex. 20).

Dr. Tate's name did not appear on any list sent by Commissioner of Narcotics to petitioner (R. 155-156, Defendant's Exs. 6, 7, 8, 9, 10, 11, 12, 13, 15, 17 and 18); in fact, the District Attorney conceded that Dr. Tate's name was not on any of the lists (R. 156).

Ruth Gertz, office manager of petitioner, produced evidence that petitioner submitted monthly reports to Collector of Internal Revenue; that these reports set forth the amount of each sale during the period covered in the indictment (R. 187); that there are 14,400 doctors' names in the files of petitioner and after receipt of Government's Ex. 5, petitioner marked every card which compared with the names on said exhibit "No Narcotics" (R. 188). Since 1937, petitioner, at request of district inspector, made out a daily list of all sales of narcotics made to doctors of 500 grains or more; these were sent in weekly (R. 189).

George Dotterweich, president of petitioner, had a conversation with Agent Bransky wherein the latter placed a limitation of 1,000 tablets of morphine sulphate to a doctor on any one order and then gave to him Defendant's Exhibit 14 (R. 199). The Narcotic Bureau corresponded with petitioner in late 1940 and suggested that petitioner offer no discount. This request was complied with and petitioner

took the narcotics out of the general listing and listed them on a separate sheet (R. 201). He also stated that a doctor could use such tablets hypodermically, orally or as medicating tablets and that 48 one-half grain tablets would be used in making one gallon of cough syrup (R. 216-218).

The Circuit Court of Appeals held that the evidence was sufficient to submit to the jury and also to support the verdict of guilt. The decision was supported on one ground that petitioner repeatedly and regularly solicited Dr. Tate's orders by means of a pink or blue slip, which it concluded was a means of stimulating narcotics sales only. The Court was in error because such slip was not inserted until after the end of the indictment (R. 201). The Court also held that because of the fact that Calhoun Falls, South Carolina was a small town and the sales by petitioner to Dr. Tate were frequent and substantial in quantity, it therefore knew that Dr. Tate was disposing of the drug in violation of the law and by continuing shipments, it became a co-conspirator with him (R. 268). The Court also stated "When Dr. Tate sent in one order for more than the agreed quantity, appellant shipped this maximum quantity and merely asked Dr. Tate to make out a new form for the excess. This was a clear violation of the spirit of the agreement" (R. 269). An examination of Government's Exhibit 4 (letter from petitioner to Dr. Tate as to such order) shows that Dr. Tate was directed "to re-order this on a New Narcotic Order blank when your present supply is nearly exhausted."

Specifications of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In sustaining the action of the District Court in denying defendant's motion for a directed verdict of not guilty, both at the close of the Government's case and again at the close of the entire case.

2. In refusing to rule that the District Court should have granted petitioner's motion to set aside verdict and for a new trial.

3. In holding that the decision of *United States* v. *Falcone*, 311 U. S. 205, is inapplicable to the case at bar.

4. In holding that the evidence was sufficient to support the verdict of the jury.

5. In holding that petitioner violated its agreement with Narcotic Commissioner, when upon receipt of an order from Dr. Tate for more than the agreed quantity, it shipped the maximum specified and asked Dr. Tate to make out a new form for the excess. A reading of Government's Exhibit 4 will confirm this error.

6. The Court erred in its charge to the jury that they had to convict both defendants, they could not convict one.

7. In holding that petitioner solicited business of Dr. Tate throughout period of indictment by means of a separate pink or blue slip, which contained only narcotic preparations, the purpose of which was to stimulate sales of narcotics.

Summary.

The Court below came to the conclusion that because Dr. Tate was a practitioner in a small town and the sales by petitioner were not within a reasonable limit, that therefore it must have known that Dr. Tate was disposing of such morphine sulphate in violation of the Act.

The Circuit Court, in adopting, verbatim, the phraseology of the Trial Judge in his decision in denying the motion to set aside the verdict, committed the same error as the Trial Judge and such adoptions would indicate an unfamiliarity on the part of the Circuit Court as to the actual facts of the case.

No limit has been placed by Congress upon sales by manufacturers to register physicians and it seems illogical, as well as illegal, that the Courts would allow a jury to read into an Act what is or is not reasonable.

The direct evidence is to the effect that petitioner had no knowledge of Dr. Tate's disposition of the drug delivered to him (R. 109). Mere quantity and frequency of sales would not overcome such direct evidence and prove knowledge of a conspiracy, beyond a reasonable doubt on the part of petitioner.

There is not an iota of proof that petitioner knew of any sale by Tate to another. The elements of intent, namely, "promoting the venture, making it his own, having a stake in its outcome", are lacking in this case.

There was no proof that petitioner knew that Dr. Tate was selling to anyone not registered under the Act, nor was there any proof that petitioner was participating in a conspiracy or knew of it.

The Governmental agency charged with interpretation of the Act set certain limits which petitioner complied with; also, it approved of petitioner's conduct of business in 1936 with Dr. Tate. It now contends that its interpretation in 1936 was erroneous and therefore petitioner, by following such advice, became a co-conspirator.

ARGUMENT.

One who complies with the provisions of the Narcotic Act as to sales on official order forms, as well as follows the interpretation by the Narcotic Bureau, cannot be held a co-conspirator upon proof of quantity and frequency of sales. Such proof does not constitute knowledge of conspiracy.

It is conceded by petitioner at the outset that one who knows of the existence of a criminal conspiracy and knowingly aids the same is guilty of conspiracy.

Neither the evidence nor the opinions of the Circuit Court of Appeals and the Trial Court warrants the conclusion that petitioner knew of the existence of a conspiracy between Dr. Tate and Messrs. Foster, Johnson, Black and others.

Petitioner complied with the provisions of the Narcotic Act, in filling orders from Dr. Tate, only upon properly executed official order forms, supplied to Dr. Tate by the United States Collector for the District of South Carolina.

The Circuit Court held that petitioner had knowledge of a conspiracy between Dr. Tate and others and participated therein, and based its opinion on the following:

a. Frequency and amount of sales particularly between 1937 and 1940.

b. Petitioner's uniform practice to insert in catalog a separate sheet of paper, sometimes pink, sometimes blue, on which was listed morphine sulphate.

c. That petitioner had agreed with federal officers not to fill any one order form in excess of 1,000 one-half grain tablets, that upon receipt of an order in excess of such amount from Dr. Tate, it filled same up to 1,000 and asked him to make out a new form for the excess.

Considering the above in their inverse order, an examination of Government's Exhibit 4, will reveal that petitioner sent a letter to Dr. Tate informing him of the rule made by the Narcotic Bureau limiting sales to 1,000 tablets on any one order. It also suggested to Dr. Tate "to re-order this on a new narcotic order blank when your present supply is nearly exhausted." It is inconceivable that the Circuit Court could have drawn such an erroneous deduction from the record, if it had read the same. Such a suggestion on the part of the petitioner was not a violation of the spirit of the agreement, as contended by the Circuit Court.

The error of the Circuit Court as to the pink and blue slip in the catalog arises from its adoption, verbatim, of the Trial Judge's opinion in denying the motion to set aside the verdict. Dr. Tate, on such subject, was shown a catalog and asked if it was made up like most of them and had a pink slip in them, entitled "Narcotic Preparations". He stated the catalog was similar but he couldn't recall the pink slip so much (R. 92); the president of petitioner said the narcotic preparations were separated from the catalog in late 1940 (R. 201).

This is the only evidence on the subject of a separate listing of narcotics and it occurred subsequent to the period covered by the conspiracy. Thus, there was no uniform practice of stimulating sales by means of a separate pink or blue slip and both Courts were in error on this phase in the case.

There remains but the frequency and amount of sales factor, which is totally insufficient to make one a co-conspirator with another or justify the inference of knowledge of a conspiracy on the part of petitioner.

The statute is silent as to a ceiling on amounts to be honored in any orders received by a manufacturer or wholesaler. In this case, the Commissioner of Narcotics placed a maximum on any one order blank, namely 1,000 half grain tablets (Defendant's Exs. 14 and 20); the petitioner never violated this order. The opinion in *United States* v. *Fleming and Son*, 251 Fed. 932, is applicable here. At page 935, Justice Thompson said:

> "These are the sole conditions which Congress has prescribed as governing the sale and distribution of narcotics by the registered dealers. It appears Congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug, and not on the druggist who fills it. • • • Wisely, or unwisely, Congress appears to have placed

no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. In an act prescribing severe penalties for its violation, courts dare not become wiser than the lawmakers and attempt to read into the act something which the lawmakers have omitted. * * *".

The Government, in *Eckert* v. *United States*, 7 F. (2d) 257, endeavored to sustain a conviction for the unlawful sale by a druggist of narcotics by showing that in six months he filled prescriptions totalling 228 ounces or 99,750 grains of morphine and 32,802 grains of cocaine. The druggist knew that most, if not all, of those to whom the prescriptions were issued, were addicts. The opinion of the Circuit Court seems more applicable to the facts of our present case than to the facts of that case itself. At page 258, it was said:

"We think the theory on which the case was tried and submitted to the jury is untenable, because not within the definition of any of the crimes denounced by the act. It does not place on the druggist the burden of inquiry into the intent and purpose of the physician in issuing the prescriptions; to the contrary, it expressly authorizes the druggist to sell on prescriptions issued by registered physicians. * * *".

"Responsibility for issuance of prescriptions is placed upon the physician, not the druggist; when brought to him to be filled it is his protection. * * *".

In reversing the conviction, the Court said at page 259:

"The amount that may be sold by a registered druggist on prescriptions not having been limited by the act, and there being no standard set up beyond which the druggist might not go in dispensing the drug within a given time, it seems to follow that the verdict of the

> jury was based upon its conclusion that the defendant was filling too many prescriptions and selling in the aggregate too much narcotic drugs to have been within the law when he made the sales charged against him, because in their judgment he exceeded a reasonable limit. * * *".

Petitioner does not assert that inasmuch as Dr. Tate was registered under the Narcotic Act, that therefore it could not conspire under any circumstances. The Government urged such proposition upon the Circuit Court and cited *Webb* v. *United States*, 249 U. S. 96; *Friedman* v. *United States*, 260 Fed. 388, cert. denied 250 U. S. 671, and *Heller* v. *United States*, 104 F. (2d) 446. These cases are of no assistance to the Government and an examination of the Friedman case will reveal that Dr. Friedman issued prescriptions with fictitious names on the same with Thompson's knowledge of such fact and further that Dr. Friedman arranged with druggist Thompson to fill such type of prescriptions. There was no such relationship between petitioner and Dr. Tate. Further, in such case the narcotics were purchased from Van Vleet-Mansfield Drug Company and Hessig-Ellis Drug Company of Memphis, Tennessee, which was the very city where Friedman and Thompson were situated. It is significant that in such case the Government asserted no contention of complicity in a conspiracy by either of the wholesale druggists. Also, *Saunders et al.* v. *United States*, 260 Fed. 386, presents a situation identical with that of the Friedman case, and again the Government made no assertion of any conspiratorial criminality on the part of the wholesale distributors.

Heller v. *United States* is entirely inapplicable as may be noted from the Circuit Court's opinion at page 447:

> "that Kuhn filled the prescription with knowledge of their fraudulent character; that this was done pur-

> suant to an understanding existing between him and Dr. Heller. Especially significant, as bearing upon this understanding, is evidence to the effect that certain prescriptions given by Heller were left undated by him so that they might be dated by Kuhn in such way as to present a record that would not excite the suspicion of the narcotic inspectors".

Our record is free from any evidence of any conversation between Dr. Tate and petitioner or any act on the part of either as to the official order forms from which the slightest imputation might be drawn of an understanding to ignore or circumvent the provisions of the Narcotic Act. In fact, the Heller case, when applied to our present situation, would support petitioner's claim of its utter lack of any knowledge on its part, not only as to the disposition by Dr. Tate but of any existent conspiracy between Dr. Tate and others.

Petitioner's knowledge of a conspiracy could not be based upon the fact that the bulk of the orders from Dr. Tate were for one-half grain sizes, inasmuch as the Commissioner of Narcotics and Agent Bransky approved filling of orders for such sizes providing the limit to physicians did not exceed 1,000 (R. p. 152, Defendant's Exs. 14 and 20). The Commissioner and his assistants are charged, by the Act itself, with its interpretation, and it cannot be heard to cry conspiracy, when its instructions on the interpetation of the Act have been followed by those complying with its provisions.

The Government argues that the orders were uniformly in the amount of 1,000 tablets and that the amount sold was so great that petitioner was bound to know that Dr. Tate could not dispense such amounts in the legitimate practice of his profession. This argument is without merit inasmuch as the Commissioner of Narcotics (Ex. 20) prescribed

the amount which petitioner could dispense on any one order and Agent Bransky (Ex. 14) prepared a schedule which he delivered to petitioner setting forth that 1,000 half grain tablets could be dispensed to a doctor on any one order. Also, Agent Bransky saw Dr. Tate's orders in petitioner's file between January and June 1936, nine in number for 6,700 half grains of morphine sulphate, and made no objection or suggestion as to the same.

Agent Bransky was at petitioner's place of business in 1936 for a purpose; his delegated duties included interpreting the provisions of the Act; his acquiescence in the state of petitioner's past records plus his written schedule as to future amounts of sale must be construed as a legal interpretation of the provisions of the Act. Having so construed its provisions, the United States cannot now be heard to complain that the Commissioner of Narcotics and Agent Bransky were in error and that petitioner's guilt can be predicated upon compliance with their interpretation.

There was no evidence of the commission of any unlawful act by petitioner. Nor was there any evidence of its knowledge of a conspiracy. Under such circumstances, the Circuit Court's opinion in this case seems to be in direct contravention to its opinion in *Di Bonaventura* v. *United States*, 15 F. (2d) 494, wherein the court said at page 496:

> "This might have justified a conviction of maintaining a nuisance or of unlawful manufacture, but not a conviction of the felony of conspiracy, in the absence of any finding that the landlord entered into a combination or agreement to violate the law, or that he, with knowledge that a conspiracy existed, not merely that the law was being violated, aided the conspirators in carrying out their unlawful design. * * *".

Subsequent to such decision, the same Fourth Circuit in *Backun* v. *United States*, 112 F. (2d) 635, had before it the question of whether one who sells property to another knowing that the buyer intends to use it for the commission of a felony renders himself criminally liable as aiding and abetting in its commission. At such time the Second Circuit had reversed the conviction in *Falcone* v. *United States*, 109 F. (2d) 579, wherein the court said at page 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. * * *".

The Court in the Backun case refused to follow the reasoning of the Circuit Court in the Falcone case relative to the ground that a co-conspirator must have a stake in the outcome of a conspiracy. The Court therein said at page 637:

> "Guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case, supra, but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. * * *".

However, the Supreme Court in affirming *United States* v. *Falcone*, 311 U. S. 205, said at page 208:

> "The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some. * * *".

This Court also said at page 210:

> "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abbettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy. * * *".

From the affirmance of *United States* v. *Falcone*, it seems logical that this Court by its approval of the Second Circuit's reversal, has overruled the reasoning in *Bachun* v. *United States*.

In the *Falcone* case, the Circuit Court assumed that at least some of the respondents knew that the sugar and cans would be used in the manufacture of illicit spirits. Such

evidence was held insufficient to show that the respondents knew of the existence of the conspiracy proven. That assumption is far more substantial than the evidence in our present case. Here there was no personal contact of any kind between Dr. Tate and petitioner; there was no concealment of the means of compliance with the provisions of the Narcotic Act; the petitioner never met Messrs. Foster, Reei or Block or even knew that they were connected with Dr. Tate. In fact, it did not possess the knowledge which both upper Courts assumed in their opinions in the *Falcone* case.

The evidence did not warrant submission of the charge of conspiracy to the jury. The reason assigned by the Trial Judge for submission was the novelty of the question involved, as appears from the Court's remarks (R. 224):

> "* * * I must confess, however, that it is a mighty close question, and if it were not a novel question I might be inclined to grant your motion, but it being a novel question and a new question, I think a District Judge should let the Circuit Court of Appeals pass on it. Of course, if I should direct a verdict, that would not end it and the question would not be settled. I think it is a question that ought to be settled by the Circuit Court of Appeals. I think the District Attorney should have indicted this defendant for a substantive offence instead of conspiracy. The Courts are frowning down on cases of conspiracy which use a drag-net to bring in the evidence. I must say that I have considerable doubt that I should not direct a verdict in that the Circuit Court of Appeals should pass upon it, since it is such an important question. I have given it considerable thought and study. I went home last night and thought about it from different angles, and it seems to me that there is probably enough testimony to submit to the jury on the question of whether or not it constitutes a conspiracy. Of course, I will hear you, Mr. Mahoney, if you care to argue."

II.

The Court's charge to the jury was improper as well as confusing and misleading.

The Court, in its charge, said that the jury had to convict both defendants, they could not convict one; that they must convict two or none (R. 228, 232).

At this stage of the trial, Black and Johnsen had plead guilty; the trial was severed as to Foster and there remained but petitioner and Dr. Tate on trial. Jurors, both concededly and rightfully, have a tremendous respect for the directions given by the Trial Judge as to the law applicable to a case. This case was no exception. Having but two defendants before it in the courtroom, and hearing the Court admonish them that they had to convict two, it was logical that jurors were impressed with those words and came to the conclusion that the two that must be convicted were the two on trial, one of which was the petitioner.

It is true that the Court, at petitioner's counsel's request, stated that they could find Dr. Tate "guilty" and the petitioner "not guilty" but added to such charge that they could find Dr. Tate and the other defendants guilty (R. 237-238).

This did not tend to clarify the situation inasmuch as there were no other defendants on trial to be found guilty by the jury at that time.

A clear, well-defined charge was required because of the doubt expressed by the Trial Judge as to the sufficiency of the evidence to take the case to the jury. The actual charge befogged rather than clarified and left but one avenue for the jurors to follow, namely to convict both defendants who were on trial.

This constituted definite prejudicial error.

Conclusion.

For the reasons stated, it is respectfully urged that the prayer of the petition should be granted and that the decision of the Circuit Court of Appeals for the Fourth Circuit, referred to, should be reversed by this Court, under writ of certiorari.

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